Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

WESTMORELAND COAL COMPANY,

Petitioner,

v.

JAMES R. RAMSEY and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

This matter concerns a claim for federal black lung benefits filed by Respondent James R. Ramsey pursuant to the provisions of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. §§ 901-945. Petitioner Westmoreland Coal Company is appealing from an opinion issued by a panel of the United States Court of Appeals for the Fourth Circuit. Petitioner raises the following issues:

A. Did the panel err by failing to address whether 20 C.F.R. § 725.503(b), which states benefits shall be payable to a miner beginning with the month during which the claim was filed if the evidence does not establish the month of onset, violates the preponderance of the evidence standard at § 7(c) of the Administrative Procedure Act?

B. Does the panel's decision conflict with the Fourth Circuit's published precedent holding that an ALJ must weigh all of the relevant evidence together in determining the existence of pneumoconiosis?

PARTIES TO THE PROCEEDINGS AND DISCLOSURE OF CORPORATE AFFILIATIONS

Petitioner:

Westmoreland Coal Company is a publicly held corporation with no parent corporation. No other publicly held entity holds more than ten percent of the stock in Westmoreland Coal Company.

Respondent:

James R. Ramsey is a former coal miner who filed for federal black lung benefits pursuant to the provisions of the Black Lung Benefits Act. 30 U.S.C. § 901-945 (2001).

Party-In-Interest:

The Director of the United States Department of Labor Office of Workers' Compensation Programs is designated by regulation as a party in all claims litigated under the Black Lung Benefits Act. 20 C.F.R. § 725.360(a)(5).

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The opinion of the United States Court of Appeals for the Fourth Circuit which gives rise to this petition is unpublished. Westmoreland Coal Co. v. Ramsey, No. 99-2049, 2001 WL 1397846 (4th Cir. Nov. 9, 2001). *See* Appendix (App.) A. The Fourth Circuit issued its order denying Petition for Rehearing and Petition for Rehearing En Banc on January 8, 2002. *See* App. D.

Westmoreland Coal Company appealed this case to the Fourth Circuit from the United States Department of Labor Benefits Review Board (Board). The decision of the Board in Ramsey v. Westmoreland Coal Co., BRB No. 98-0692 BLA (June 24, 1999) is unreported. *See* App. B. The Board issued two prior decisions on October 26, 1995 and September 26, 1997.

The case originated before the United States Department of Labor Office of Administrative Law Judges. Administrative Law Judge (ALJ) Pamela Lakes Wood issued Decision and Orders awarding benefits on remand dated August 22, 1996 and January 27, 1998. Those decisions are unpublished. *See* App. C. ALJ Julius A. Johnson issued the original unpublished Decision and Order denying benefits on February 15, 1995.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit has jurisdiction over an appeal from a final order of the Board pursuant to Section 21(c) of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. § 921(c), as incorporated by Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a). The United States Court of Appeals for the Fourth Circuit rendered the decision at issue on November 9, 2001.

The Fourth Circuit filed the order denying Petitioner Westmoreland Coal Company's Petition for Rehearing and Petition for Rehearing En Banc on January 8, 2002. Petitioner timely filed this Petition for Writ of Certiorari within ninety days of that denial. *See* 28 U.S.C. § 2101(c); SUP. CT. R. 13.3. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. CONST. amend V.

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 556(d), in pertinent part:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying

> statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

5 U.S.C. § 557(c)(3)(A), in pertinent part:

> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of--(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented in the record.

30 U.S.C. § 923(b), in pertinent part:

> In determining the validity of claims under this part, all relevant evidence shall be considered . . . .

Several regulations are also relevant in this matter including 20 C.F.R. §§ 718.201, 718.202(a), 718.304, and 725.503(b)[1]. Because of their length, these regulations are cited verbatim in Appendix E.

STATEMENT OF THE CASE

This matter concerns a claim for federal black lung benefits filed by Respondent James R. Ramsey pursuant to the provisions of the Federal Coal Mine Health and Safety Act (FCMHSA) of 1969, 30 U.S.C. §§ 901-945. Mr. Ramsey filed a duplicate application for benefits with the Department of Labor on August 31, 1993. After a formal hearing, ALJ Johnson issued a Decision and Order denying benefits on February 15, 1995. He found the evidence failed to prove the existence of pneumoconiosis or disability due to pneumoconiosis.[2]

Mr. Ramsey appealed to the Department of Labor's Benefits Review Board (Board). On October 26, 1995, the Board vacated the decision in part and remanded the case to the ALJ for

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[1] Subsequent to the ALJ's and Benefits Review Board's decisions in this case, the Department of Labor amended the regulations governing the administration of federal black lung benefits. *See* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,919 (December 20, 2000) (*codified at* 20 C.F.R. pt 718, 722, 725)(2001). Those amendments became effective January 19, 2001. All references to the Code of Federal Regulations in this Petition are referring to the "old" 2000 regulations relied on by the ALJ and Benefits Review Board. No substantive chages were made to 20 C.F.R. § 725.503(b), the regulation at issue in this case.

[2] *See* App. E at 20 C.F.R. § 718.201 for federal definition of pneumoconiosis.

reconsideration. The Board affirmed the ALJ's finding that the x-ray evidence fails to establish the existence of pneumoconiosis under 20 C.F.R. § 718.202(a)(1). The Board remanded the claim for further consideration of whether the evidence establishes the existence of pneumoconiosis (20 C.F.R. § 718.202(a)(4)), total disability due to pneumoconiosis (20 C.F.R. § 718.202(c)), or a material change in condition (20 C.F.R. § 725.309(d)).

On remand, the Office of Administrative Law Judges transferred the case to ALJ Wood for reconsideration because ALJ Johnson was no longer available. On August 22, 1996, ALJ Wood issued a Decision and Order on Remand granting benefits to the Claimant. She found the Claimant was totally disabled by "legal" coal workers' pneumoconiosis. [3]

Westmoreland Coal Company appealed the decision granting benefits to the Board. On September 26, 1997, the Board issued a decision and order

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[3] Congress defined "pneumoconiosis" as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Clinical pneumoconiosis, referred to as "medical" pneumoconiosis, is a lung disease caused by fibrotic reaction of the lung tissue to inhaled dust, which is generally visible on chest x-ray films as opacities. Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1, 7 (1976). "Legal" pneumoconiosis refers to all lung diseases which meet the statutory or regulatory definition of any lung disease which is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Hobbs v. Clinchfield Coal Co., 917 F.2d 790, 792 (4th Cir. 1990). "Legal" pneumoconiosis can include diseases beyond what is usually described as "medical" pneumoconiosis. *See generally*, Hobbs v. Clinchfield Coal Co., 45 F.3d 819, 821 (4th Cir. 1995)(discussing "medical" and "legal" pneumoconiosis); 20 C.F.R. § 718.201.

vacating ALJ Wood's findings of pneumoconiosis pursuant to § 718.202(a)(4), total disability pursuant to § 718.204(b), and a material change in condition pursuant to § 725.309. The Board remanded the claim for further consideration.

ALJ Wood issued a decision and order on remand granting benefits dated January 27, 1998. *See* App. C. After the parties filed briefs, the Board issued a decision and order affirming the award of benefits on June 24, 1999. *See* App. B. Westmoreland Coal Company appealed to the United States Court of Appeals for the Fourth Circuit.

A three-judge panel of the Fourth Circuit rendered a decision and order on November 9, 2001. *See* App. D. The panel summarily affirmed the award of benefits finding no error by the ALJ or the Board. the panel failed to address Westmorland Coal Company's arguments concerning this Court's holding in Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 270-71 (1994) or the Fourth Circuit's holding in Island Creek Coal Co. v. Compton, 211 F.3d 203 (4th Cir. 2000).

The Fourth Circuit filed the order denying Westmoreland Coal Company's Petition for Rehearing and Petition for Rehearing En Banc on January 8, 2002. *See* App. D. Petitioner timely filed this Petition for Writ of Certiorari within ninety days of that denial.

REASONS FOR GRANTING THE WRIT

A. The panel erred by failing to address whether 20 C.F.R. § 725.503(b), which states benefits shall be payable to a miner beginning with the month during which the claim was filed if the evidence does not establish the month of onset, violates the preponderance of the evidence standard at § 7(c) of the Administrative Procedure Act.

1. The Department of Labor does not have the authority to supersede Administrative Procedure Act's standard of proof requirements by promulgating regulations.

The Secretary of the Department of Labor promulgated 20 C.F.R. § 725.503(b), which states:

> Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed.

20 C.F.R. § 725.503(b). Whether this regulation violates the preponderance of the evidence standard at § 7(c) of the Administrative Procedure Act (APA) turns on the question of whether the Department of Labor may supercede the APA's standard of proof provisions by promulgating a regulation.

The APA is applicable to the Black Lung Benefits Act (BLBA) by way of an intricate statutory scheme. The BLBA is Subchapter IV of the Federal Mine Safety Act. 30 U.S.C.A. § 901. Section 507 of the Federal Mine Safety Act commands that the procedures in the APA, 5 U.S.C. §§ 551-559, generally do not apply to claims for black lung benefits, "[e]xcept as otherwise provided" by statute. 30 U.S.C. § 956. The BLBA then incorporates by negative reference certain sections of the Longshore and Harbor Workers' Compensation Act. 30 U.S.C. § 932(a). One of the incorporated provisions is § 19(d), which makes the adjudicatory standards in § 5 of the APA (5 U.S.C. § 554) applicable to claims for benefits. 33 U.S.C. § 919(d) as incorporated by 30 U.S.C. § 932(a). Section 5 of the APA incorporates §§ 7 and 8 of the APA (5 U.S.C. §§ 556, 557). 5 U.S.C. § 554(d).

Section 7(c) of the APA mandates that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Title 20 C.F.R. § 725.503(b) allows a claimant to receive benefits from the date of filing even when there is no medical proof submitted by the claimant showing he has complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at that time. The primary issue of this Petition is which of these two conflicting provisions has controlling weight.

The APA provides that it cannot be superseded, modified, or amended by subsequent legislation "except to the extent that [the legislation] does so expressly." 5 U.S.C. § 559 (2001). The BLBA states the enumerated provisions of the Longshore Act (and the cross-referenced provisions in the APA) are applicable to claims for black lung benefits under the BLBA "except as otherwise provided for" by statute or "by regulations of the Secretary." 30 U.S.C. § 932(a).

In Greenwich Collieries, this Court stated:

> Accordingly, -- assuming, arguendo, that the Department has the authority to displace § 7(c) through regulation -- this ambiguous regulation does not overcome the presumption that these adjudications under the BLBA are subject to § 7(c)'s burden of proof provision.

Greenwich Collieries, 512 U.S. at 272 (emphasis added). This language indicates a question exists regarding whether the Department of Labor may supercede the APA's proof provisions by regulation, but the Court deemed it unnecessary to resolve the issue in the Greenwich case because the regulation itself was ambiguous. Here, the regulation in question clearly shifts the burden of proving the date of onset from the claimant to the employer. Thus, 20 C.F.R. § 725.503(b) can only be valid if the Department of Labor has the authority to supercede the APA's statutory standard of proof provisions by promulgating regulations. The Department of Labor does not have any such authority.

The United States Court of Appeals for the Seventh Circuit has held in a federal black lung claim that the Department of Labor does not have "unfettered discretion" to supercede the formal requirements of the APA. Director, OWCP v. Peabody Coal Co., 554 F.2d 310, 341-42 (7th Cir. 1977). In Peabody, the Benefits Review Board vacated hearings which were held by hearing officers who were not Administrative Law Judges appointed pursuant to the Longshore Act. The Seventh Circuit reversed the Benefits Review Board's holding after finding the express provisions inserted by

Congress into Department of Labor Appropriations Acts expressly authorized the Secretary to hire hearing examiners. The court cautioned as follows:

> We cannot agree with the respondents that the Secretary has unfettered discretion to supercede the formal requirements of the APA. Congress had earlier expressed its intent that hearings follow the provisions of 5 U.S.C. § 554. By virtue of that section's cross-reference to section 556, subsection (b) of the latter section would have allowed some flexibility regarding the presiding officer absent the specific requirement of 5 U.S.C. § 3105 qualification. The second sentence of LHWCA §19(d), 33 U.S.C. § 919(d) (Supp. V, 1975), was obviously intended to confine the choice of presiding officers to those specified in §556(b)(3). When Congress formulated the paragraph subsequently set forth in all succeeding appropriation acts, it clearly did not authorize the Secretary to modify or supercede any of the provisions of §§554, 556, or 557 other than the s 19(d) limitation of proper officers to those specified in § 556(b)(3).
>
> Thus the Secretary simply cannot be understood to possess authority to supercede the provisions of the APA as he sees fit.

Peabody Coal Co., 554 F.2d at 341-42 (citations and footnote omitted).

The United States Court of Appeals for the Fifth Circuit addressed this question in the federal black lung case of U.S. Pipe & Foundry Co. v. Webb, 595 F.2d 264 (5th Cir. 1979). The U.S. Pipe & Foundry Company appealed from an order of the Benefits Review Board awarding federal black lung benefits. The U.S. Pipe & Foundry Company argued that a lengthy delay in notifying it of the claimant's application for benefits was invalid under the regulations requiring prompt notice to the employer. The employer also argued that, if the regulation were construed to permit delayed notice, then the regulation was invalid because it was not authorized by § 422 of the FCMHSA. 30 U.S.C. § 932. The Fifth Circuit held that, notwithstanding the "except as otherwise provided" language of 30 U.S.C. § 932(a), the Secretary may not promulgate regulations which are inconsistent with the terms of incorporated sections of the Longshore Act. Webb, 595 F.2d at 273 & n. 10 (citing Director, OWCP v. Alabama By-Products Corp., 560 F.2d 710, 718 (5th Cir. 1977)(the court "would not hesitate to strike down" a regulation which is entirely inconsistent with § 19(d) of the amended Longshore Act as incorporated into the FCMHSA unless the departure from the terms of the statute was expressly authorized by Congress)).[4]

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[4] The United States Court of Appeals for the Third Circuit touched on this issue in the federal black lung case of Patton v. Director, OWCP, 763 F.2d 553 (3d Cir. 1985). Citing to the Fifth and Seventh Circuits' decisions in Webb, Alabama By-Products Corp., and Peabody Coal Co., the Third Circuit panel concluded they did not need to rule on the precise scope of the Secretary's authority to supercede the APA because the requirements of the APA and the questioned regulation were fully consistent. Patton, 763 F.2d at 559 n.13.

More recently, the United States District Court for the Northern District of Illinois within the Seventh Circuit addressed whether the Department of Labor could supersede the APA by regulation in the context of a case arising under the Immigration and Nationality Act. Gladysz v. Donovan, 595 F. Supp. 50, 53-54 (N. D. Ill. 1984). The court held the Director has no such authority stating as follows:

> The Secretary contends that he had the power to override the statutory command of the APA (as construed in *Stenographic Machines*) that an alien has standing to challenge a labor certification denial. It is true that Congress has granted the Secretary plenary power to formulate the administrative procedures under which he will decide labor certification petitions. . . But even if he has the power to deny or restrict an alien's right to "administrative" review, the Secretary has gone one step further and tried to deny "administrative-*judicial* review" to an alien seeking review. . . . The Department of Labor cannot unilaterally override the review provisions of the APA, a Congressional Act; only Congress can do so. It is elementary that "the rule-making power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather 'it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.' "

Gladysz, 595 F. Supp. at 53 (*quoting* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976))(citations omitted and emphasis added).

The United States Court of Appeals for the Fourth Circuit has taken an approach contrary to the United States Court of Appeals for the Fifth and Seventh Circuits. Addressing the issue of the Department of Labor's ability to promulgate regulations inconsistent with the incorporated sections of the Longshore Act in Director, OWCP v. National Mines Corp., 554 F. 2d 1267, 1275 (4th Cir. 1977), the Fourth Circuit held that where the empowering provision of a statute states simply that the agency may make such rules and regulations as may be necessary to carry out the provisions of this Act, the validity of a regulation promulgated thereunder will be sustained as long as it is reasonably related to the purposes of the enabling legislation. National Mines Corp., 554 F. 2d at 1275.

Thus, there is a conflict between the Circuits regarding whether the Department of Labor has the authority to supercede the provisions of the Longshore Act incorporated into the BLBA, including those provisions of the APA. The approach taken by the Fifth and Seventh Circuits is more rational and consistent with the traditional notions of statutory and regulatory construction.

2. Title 20 C.F.R. § 725.503(b) violates the preponderance of the evidence standard at § 7(c) of the Administrative Procedure Act.

The BLBA requires an operator to pay monthly benefits once a determination is made that a claimant has established he is totally disabled due to coal workers' pneumoconiosis or that he has complicated coal workers' pneumoconiosis. 30 U.S.C. § 932(d). The regulations promulgated by the Department of Labor provide benefits are payable beginning with the month of onset of total disability, or:

> Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed, or the month during which the Claimant elected review under part 727 of this subchapter.

20 C.F.R. § 725.503(b).

If § 725.503(b) is valid in allowing an ALJ to use the filing date in certain situations, it is advantageous for a claimant not to definitively establish when pneumoconiosis becomes totally disabling. The claimant receives federal black lung benefit payments for months in which there had been no medical proof of record to establish his eligibility to benefits. Thus, 20 C.F.R. § 725.503(b) is invalid given the requirements set forth in § 7(c) of the APA allocating the burden of proof in federal black lung claims. 5 U.S.C. § 556(d).

This Court articulated the standard for the proponent's burden of proof in hearings controlled by the APA, 5 U.S.C. § 551 *et. seq.* (1988) in Steadman v.

Securities and Exchange Comm'n, 450 U.S. 91, 102 (1981), *reh'g. denied*, 451 U. S. 933 (1981). In Steadman, the Court tracked the language of the APA, which requires an order be based upon "substantial evidence." The Court held, "[T]he language and legislative history of § 7(c) lead us to conclude, therefore, that § 7(c) was intended to establish a standard of proof and that standard adopted is the traditional preponderance-of-the-evidence standard." *Id.*

The Court subsequently addressed, in the context of a federal black lung case, what is meant by "preponderance of the evidence." Mullins Coal Co. v. Director, OWCP, 484 U.S. 135 (1987), *reh'g denied*, 484 U.S. 1047 (1988). In determining whether the claimant can establish his burden of proof under a preponderance-of-the-evidence standard by presenting a single piece of supporting evidence, the Court noted the claimant is required to "establish" the presence of the disease. 484 U.S. at 147. The Court focused on the distinction between evidence which constitutes "evidence" of the disease and that which "establishes" it. 484 U.S. at 147-49. The Court reiterated the claimant bears the burden of proof by a preponderance of the evidence. 484 U.S. at 158-59.

The Court, again in a federal black lung case, addressed the claimant's burden of proof under the APA in Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994). In Greenwich Collieries, the Court referred back to its decision in Steadman stating that the proponent of a rule under § 7(c) of the APA had to meet his burden of proof by a preponderance of the evidence. The Court explained that "[o]ur holding that the party with the burden of proof must prove its case by a preponderance only makes sense if the burden of

proof means the burden of persuasion." 512 U.S. at 281. Thus, if the evidence is evenly balanced in a federal black lung claim, the claimant has not met his burden of persuasion. 512 U.S. at 281.

The regulation found at 20 C.F.R. § 725.503(b) improperly allocates the burden of proof in allowing an ALJ to use the month in which a claim was filed rather than the time he definitively determines a claimant is disabled due to coal workers' pneumoconiosis or has contracted complicated coal workers' pneumoconiosis. Since the claimant bears the burden of proof and the burden of persuasion in accordance with Greenwich Collieries, the filing date itself should only be used if the ALJ determines there is medical evidence during the month in which the claimant filed the claim establishing disabling pneumoconiosis or complicated pneumoconiosis. Otherwise, the claimant does not bear the burden of proof or the burden of persuasion. Indeed, an employer can be required to pay months or even years of black lung benefits when there is no medical proof of record which shows a claimant is entitled to benefits for that specific time period.

Title 20 C.F.R. § 725.503(b) is invalid under § 7(c) of the APA because it allows a claimant to receive benefits from the date of filing even when there is no medical proof submitted by the claimant showing he has complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at that time. The regulation improperly shifts the burden of proof and persuasion to the employer to submit evidence to show when the claimant, in fact, became totally disabled due to pneumoconiosis or contracted complicated pneumoconiosis. The regulation has created an improper presumption which shifts the burden to the

employer to establish when an individual claimant becomes totally disabled due to pneumoconiosis or acquires complicated coal workers' pneumoconiosis. The ALJ must weigh the evidence before him or her and make a definite determination of when the claimant establishes entitlement to benefits.

For these reasons, the panel's finding that the ALJ's decision contains "no errors of law or fact" on this issue is legally incorrect. *See* App. A at 5. Westmoreland Coal Company respectfully requests the Court consider this question of exceptional importance, as the burden of proof and persuasion is being improperly shifted to employers in numerous federal black lung claims in direct violation of this Court's holding in Greenwich Collieries.

B. The panel's decision conflicts with the Fourth Circuit's published precedent holding that an ALJ must weigh all of the relevant evidence together in determining the existence of pneumoconiosis.

The Part 718 regulations provide four means to prove the existence of pneumoconiosis. The claimant can prove the existence of pneumoconiosis by: radiographic evidence (20 C.F.R. § 718.202(a)(1)); biopsy or autopsy evidence (20 C.F.R. § 718.202(a)(2)); invoking one of several presumptions (20 C.F.R.§ 718.202(a)(3)); and a well-reasoned physician's diagnosis of pneumoconiosis supported by the objective medical evidence (20 C.F.R.§ 718.202(a)(4)).

On May 2, 2000, the United States Court of Appeals for the Fourth Circuit held an ALJ must weigh all of the relevant evidence together in determining the existence of pneumoconiosis under 20 C.F.R

§ 718.202(a)(1)-(a)(4). Island Creek Coal Co. v. Compton, 211 F.3d 203, 208-09 (4th Cir. 2000); *see also* Penn Allegheny Coal Co. v. Williams, 114 F.3d 22 (3d Cir. 1997). Prior to Compton, ALJs could find pneumoconiosis based on only one of the three types of evidence or rely on the presumptions without considering all of the relevant evidence together.

In their decisions dated 1995, 1996, and 1998, ALJs Johnson and Wood considered the x-ray and physicians' opinion evidence separately under § 718.202(a)(1)-(a)(4). *See* App. C. Indeed, the Benefits Review Board requried ALJ Wood to commit this error. On October 26, 1995, the Board vacated the decision in part and remanded the case to ALJ Wood for reconsideration. The Board affirmed the ALJ's finding that the physicians' opinion evidence fails to establish the existence of pneumoconiosis under § 718.202(a)(1). The Board remanded the claim for further consideration only of whether the physicians' opinion evidence establishes the existence of pneumoconiosis pursuant to § 718.202(a)(4), total disability due to pneumoconiosis (§ 718.202(c)), or a material change in condition. The Board directed the ALJ to consider the evidence separately on the existence of pneumoconiosis issue, which is in direct violation of the Fourth Circuit's holding in Compton.

Westmoreland Coal Company alleged both ALJs erred by finding the existence of pneumoconiosis without considering all of the relevant evidence together in its brief and reply brief filed with the United States Court of Appeals for the Fourth Circuit on September 27, 1999 and January 5, 2000. The Fourth Circuit subsequently decided Compton on May 2, 2000. On May 8, 2000, Westmoreland Coal Company filed a notice of supplemental authority pursuant to Federal

Rule of Appellate Procedure 28(j) advising the panel of the Compton decision. Counsel for Westmoreland Coal Company also discussed the Compton decision during the oral argument on June 7, 2000. However, in the decision dated November 9, 2001, the panel never addressed the ALJ's failure to weigh all of the relevant evidence together in determining the existence of pneumoconiosis under 20 C.F.R. §§ 718.202(a)(1)-(a)(4) as required by Compton.

In other cases decided by the Fourth Circuit since Compton where the ALJ did not weigh all of the evidence together, the court has consistently and routinely remanded them for further consideration of the evidence. *See, e.g.*, Westmoreland Coal Co., Inc. v. Bradley, No. 00-1192 (4th Cir. Jan. 19, 2001) (unpublished); Consolidation Coal Co. v. Brown, No. 98-1923 (4th Cir. Sept. 26, 2000) (unpublished); Westmoreland Coal Co., Inc. v. Russell, No. 99-1411 (4th Cir. June 28, 2000) (unpublished). Therefore, to be internally and legally consistent, the panel should have remanded this claim to the ALJ for reconsideration regarding whether a preponderance of all the evidence is sufficient to establish the existence of pneumoconiosis when weighed together under 20 C.F.R. § 718.202(a)(1)-(a)(4) as required by Compton. Petitioner Westmoreland Coal Company received disparate treatment in violation of its right to due process.[5] U.S. CONST. amend V.

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5 That the injured party here is a corporation makes it no less entitled to due process. The Fifth Amendment does not exclude corporations from the right of due process.

CONCLUSION

Westmoreland Coal Company requests the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WESTMORELAND COAL COMPANY, INCORPORATED,

Petitioner,

v. No. 99-2049

JAMES R. RAMSEY; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of an Order of the Benefits Review Board. (98-692-BLA)

Argued: June 7, 2000
Decided: November 9, 2001
[Entered November 9, 2001]

Before WIDENER, WILKINS, and WILLIAMS, Circuit Judges.

Petition denied and case remanded with instructions by unpublished per curiam opinion.

COUNSEL

ARGUED: Douglas Allan Smoot, JACKSON & KELLY, P.L.L.C., Morgantown, West Virginia, for Petitioner. Helen Hart Cox, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondents. ON BRIEF: Kathy L. Snyder, JACKSON & KELLY, P.L.L.C., Morgantown, West Virginia, for Petitioner. Henry L. Solano, Solicitor of Labor, Donald S. Shire, Associate Solicitor for Black Lung Benefits, Patricia M. Nece, Counsel for Appellate Litigation, Richard A. Seid, Counsel for Administrative Litigation and Legal Advice, Office of the Solicitor, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Director.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The employer, Westmoreland Coal Company (Westmoreland), challenges the Benefits Review Board's (the Board) decision upholding the Administrative Law Judge's (ALJ) award of benefits under the Black Lung Benefits Act (the Act), 30 U.S.C. S 901-945, to claimant James R. Ramsey. For the reasons that follow, we deny Westmoreland's petition for review.

I.

Ramsey has worked in or around coal mines for 21 years. He first worked for the Ames Mining Company from 1948 to 1956 operating a machine cutting coal in the mines. In 1956, he left the coal industry because the coal dust from the mines bothered him. In 1972 he returned to the industry and worked as a hydraulic mechanic for Westmoreland. While Ramsey did not work in the mines while performing his last duties, he was still exposed to the coal dust on the machines he was servicing and to the dust emitted from a nearby preparation plant. Ramsey retired in 1985.

Ramsey filed his first claim for benefits under the Act with the Department of Labor on December 9, 1987. The Board affirmed the ALJ's denial of this claim in 1992. *Ramsey v. Westmoreland Coal Co.*, BRB No. 90-1538 BLA (May 27, 1992). Ramsey then filed a duplicate claim for benefits with the Department of Labor on August 31, 1992. This is the only claim at issue on this appeal.

Upon initial consideration of Ramsey's duplicate claim, the district director found that Ramsey was eligible for benefits and granted an award on June 8, 1994. Westmoreland disagreed with this finding and requested a hearing in front of an ALJ. Following the hearing, the ALJ issued a decision denying Ramsey benefits under the Act after finding that the evidence was insufficient to show that Ramsey suffered from legal pneumoconiosis and that Ramsey was totally disabled due to pneumoconiosis. *Ramsey v. Westmoreland Coal Co.*, No. 94-BLA-1898 (Feb. 15, 1995).

Ramsey appealed the ALJ's decision to the Board, and the Board vacated the ALJ's determination that the medical opinion evidence was insufficient (1)

to establish the existence of legal pneumoconiosis and (2) to establish that Ramsey's total disability was due to pneumoconiosis. *Ramsey v. Westmoreland Coal Co.*, BRB No. 95-1186 BLA (Oct. 26, 1995). The Board remanded the case to the ALJ for reconsideration of those two issues.* Medical evidence from at least 29 doctors, including Dr. Donald L. Rasmussen and Dr. George L. Zaldivar, was before the ALJ when she reconsidered Ramsey's claim. Upon examination of this medical evidence, the ALJ awarded benefits after finding that Ramsey did have pneumoconiosis arising from his coal mine employment and that Ramsey was totally disabled due to his pneumoconiosis. *Ramsey v. Westmoreland Coal Co.*, No. 94-BLA-1898 (Aug. 22, 1996). In reaching this conclusion, the ALJ first concluded that under 20 C.F.R. S 718.201 "any chronic pulmonary disease will qualify as pneumoconiosis if it is either related to or aggravated by coal mine dust exposure." The ALJ then found, primarily relying on Dr. Rasmussen's report, that Ramsey had chronic bronchitis/COPD as a result of coal mine dust exposure and "a minimal amount of coal workers' pneumoconiosis." The ALJ also relied on Dr. Rasmussen's report to find that legal pneumoconiosis was "a contributing cause to his [Ramsey's] total disability."

Once more, Westmoreland appealed to the Board, which remanded the case to the ALJ again for further consideration of the evidence. *Ramsey v. Westmoreland Coal Co.*, BRB No. 96-1620 BLA (Sept. 26, 1997). The Board vacated the ALJ's determination that

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* The ALJ had already determined that the presumption in 20 C.F.R. S 718.203(b) that any pneumoconiosis arose out of coal mine employment applied and that Ramsey was totally disabled.

Ramsey had legal pneumoconiosis after finding that the ALJ's weighing of the medical evidence was flawed. The Board also vacated the finding that Ramsey's total disability was due to pneumoconiosis because the ALJ improperly interpreted the medical evidence.

On remand, the ALJ once again found that Ramsey was entitled to an award of benefits. *Ramsey v. Westmoreland Coal Co.*, No. 94-BLA-1898 (Jan. 27, 1998). The ALJ explained that the medical evidence did support a finding of legal pneumoconiosis because Dr. Rasmussen's report was entitled to significant weight in that it was better reasoned and better supported. Dr. Rasmussen had examined Ramsey, and Dr. Rasmussen provided support for his opinion. The ALJ went on to explain why she found the other physicians', including Dr. Zaldivar's, opinions less persuasive than Dr. Rasmussen's. Among other reasons were that Dr. Zaldivar did not adequately explain the reasons for his conclusion; his findings in other specific respects differed from those of other physicians; and Dr. Rasmussen's findings were "well reasoned, well supported . . . highly probative, and entitled to significant weight."

Westmoreland timely appealed this latest determination by the ALJ to the Board, which issued an opinion affirming the ALJ's grant of benefits to Ramsey. *Ramsey v. Westmoreland Coal Co.*, BRB No. 98-0692 BLA (Jun. 24, 1999). The main thrust of the Board's opinion addressed Westmoreland's arguments that the ALJ erred in finding that Ramsey suffered from legal pneumoconiosis as defined in the regulations, 20 C.F.R. S 718, 202(a)(4). On these questions, the Board found substantial evidence to support the ALJ's opinion and

determined that any errors made were harmless. Otherwise, the Board affirmed the ALJ's finding that Ramsey's total disability was due to pneumoconiosis because it found that Westmoreland did not challenge that issue on appeal.

Westmoreland appeals this most recent opinion of the Board and asserts nine errors as follows: (1) the ALJ failed to explain why Dr. Rasmussen's opinion was more persuasive, (2) the ALJ erroneously discredited several doctors' opinions for opining that coal dust cannot cause obstructive impairments, (3) the ALJ erroneously credited a doctor's diagnosis of pneumoconiosis based on a positive x-ray interpretation after finding that x-ray evidence failed to show pneumoconiosis, (4) the ALJ's determination that certain doctors' opinions were unreasoned was not supported by substantial evidence, (5) the ALJ provided an erroneous basis for discrediting Dr. Zaldivar's opinion, (6) the ALJ incorrectly included all chronic pulmonary diseases within the definition of pneumoconiosis, (7) the Board erred in determining that Westmoreland did not challenge the ALJ's finding of total disability due to pneumoconiosis on appeal, (8) the ALJ improperly incorporated prior flawed findings of fact and did not re-analyze the evidence, and (9) the ALJ erred in setting the date of onset of disability as the date Ramsey filed his second claim.

II.

We review the Board's determinations to ensure that it properly adhered to its own statutory standard of review. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193 (4th Cir. 1995). The Board reviews the ALJ's findings of fact to determine whether they are supported by substantial

evidence. *Dehue*, 65 F.3d at 1193. Thus, in evaluating the Board's decision, we also review the record to determine whether substantial evidence supported the ALJ's findings of fact. *Dehue*, 65 F.3d at 1193. We review the Board's legal conclusions de novo. *Dehue*, 65 F.3d at 1193.

III.

After consideration of the briefs, record, and oral argument, we are of opinion that no reversible error exists in this case, and we affirm the decision of the Board for the reasons expressed in its opinion. We note that issues one through five primarily concern the weight of evidence and the credibility of witnesses. We decline to revisit those assessments and find that substantial evidence in the record supports the ALJ's conclusions. Likewise, we find no errors of law or fact on issues six, eight, or nine.

The last issue to consider is seven, in which Westmoreland takes issue with the Board's finding that Westmoreland did not challenge the cause of disability as due to pneumoconiosis. In support of its position, Westmoreland points to a single page in its brief before the Board, a clause in which it argues that "the existence of coal workers' pneumoconiosis and total disability due to pneumoconiosis are not supported by evidence or the relevant case law." The Board treated this in its 1999 opinion as challenging the existence of pneumoconiosis but not the cause finding. And its 1999 opinion treats existence extensively, but not cause in the sense contested by Westmoreland.

Not enough of the proceedings before the Board are brought to our attention by Westmoreland for us to find that the Board's decision found at footnote 2 on page 3 of its opinion (A. 319) is in error.

Therefore, we affirm the Board on this ground. Alternately, we will treat the assignment of error as an argument that disability due to pneumoconiosis is not established by the record.

On that point, we adopt the reasoning of the ALJ in footnote 8 on page 9 of her opinion of January 30, 1998, which is as follows:

> At the risk of belaboring this point, my reasoning was as follows: (1) Based upon the opinions of Drs. Loudon, Renn, Stewart, Rasmussen, and Abraham, which I found to be more persuasive than that of Dr. Zaldivar on the issue, the Claimant established that he has COPD/chronic bronchitis; (2) Based upon Dr. Rasmussen's opinion, which I found to be more persuasive than the other opinions, the Claimant established that he has "legal pneumoconiosis ", because his COPD/chronic bronchitis was caused by coal mine dust exposure; and (3) Based upon the opinions of Drs. Loudon, Renn, Stewart, and Rasmussen, which I found to be more persuasive than that of Dr. Zaldivar, the Claimant established that his COPD/chronic bronchitis was a significant contributing factor to his total disability. Using simple logic and common sense, the Claimant has therefore established that he has pneumoconiosis arising out of coal mine employment.

A. 314.

We do not treat the brief of Westmoreland as raising any issue under *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943).

Accordingly, the petition for review of Westmoreland must be denied and the case remanded to the Board with directions that it see to the award of benefits in favor of Ramsey.

PETITION DENIED AND REMANDED WITH INSTRUCTIONS

BRB No. 98-0692 BLA

JAMES R. RAMSEY *Claimant-Respondent*	)
v.	)
WESTMORELAND COAL COMPANY *Employer-Petitioner*	)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *Party-in-Interest*	)

DATE ISSUED: JUN 24 1999
[Entered: June 24, 1999]

DECISION and ORDER

Appeal of the Decision and Order on Remand of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Douglas A Smoot and Kathy L. Snyder (Jackson & Kelly), Charleston, West Virginia, for employer.

Jill M. Otte (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-1898) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) on a duplicate claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This claim has been before the Board on two prior occasions. In a decision dated February 15, 1995, Administrative Law Judge Julius A. Johnson credited claimant with at least twenty-one years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. Judge Johnson found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[1] Judge Johnson also found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Further, although Judge Johnson found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), he found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, Judge Johnson denied benefits. In response

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[1] Claimant filed his initial claim on December 7, 1987. Director's Exhibit 26. On April 26, 1990, Administrative Law Judge David A. Clarke, Jr. issued a Decision and Order denying benefits. *Id.* The bases of Judge Clarke's denial were claimant's failure to establish pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id.* The Board affirmed Judge Clarke's denial of benefits. *Ramsey v. Westmoreland Coal Co.*, BRB No. 90-1538 BLA (May 27, 1992)(unpub.). Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on August 31, 1993. Director's Exhibit 1.

to claimant's appeal, the Board vacated Judge Johnson's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. Although the Board affirmed Judge Johnson's finding of no pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), the Board vacated Judge Johnson's finding of no pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration of the evidence on this issue. The Board also vacated Judge Johnson's finding of no total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), and remanded the case for further consideration of the evidence on this issue. *Ramsey v. Westmoreland Coal Co.*, BRB No. 95-1186 BLA (Oct. 26, 1995)(unpub.).

On the first remand, the case was transferred to the administrative law judge, who found the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b). Additionally, the administrative law judge found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(4), and sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. In disposing of employer's appeal, the Board affirmed the administrative law judge's finding of total disability at 20 C.F.R. §718.204(c)(1) and (c)(4). However, the Board vacated the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and thus, her finding that the evidence is sufficient to establish a material change in

conditions at 20 C.F.R. §725.309. The Board also vacated the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). *Ramsey v. Westmoreland Coal Co.*, BRB No. 96-1620 BLA (Sept. 26, 1997)(unpub.). On the most recent remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b). Accordingly, the administrative law judge again awarded benefits, which she ordered to commence as of August 1993, the date the claim was filed.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding the onset date of disability to be August 1993, the date the claim was filed. The Director, Office of Workers' Compensation Programs (the Director), contends that a diagnosis of a chronic coal dust related disease, standing alone, is sufficient to satisfy the regulatory definition of pneumoconiosis. The Director further contends that 20 C.F.R. §725.503 validly implements the directives of the Black Lung Disability Act and is consistent with the Administrative Procedure Act (APA). Claimant has not filed a brief in this appeal.[2]

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[2] Inasmuch as the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). We disagree. The administrative law judge considered the medical opinions of Drs. Loudon, Rasmussen, Renn, Stewart and Zaldivar.[3] Whereas Dr. Rasmussen opined that claimant suffers from pneumoconiosis, Director's Exhibits 10, 26, Drs. Loudon, Renn, Stewart and Zaldivar opined that claimant does not suffer from pneumoconiosis, Director's Exhibit 26; Employer's Exhibits 1-5. The administrative law judge properly accorded determinative weight to the opinion of Dr. Rasmussen over the contrary opinions of Drs. Loudon, Renn, Stewart and Zaldivar because she found Dr.

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[3] Employer did not raise the administrative law judge's failure to consider the medical opinions of Drs. Abraham, Daniel, Maramba, MacCullum and Leef. Dr. Abraham opined that claimant suffers from chronic obstructive pulmonary disease and pneumoconiosis. Director's Exhibit 26; Claimant's Exhibit 1. Drs. Daniel and Maramba opined that claimant suffers from chronic obstructive pulmonary disease. Director's Exhibit 26. Drs. MacCullum and Leef opined that claimant does not suffer from occupational pneumoconiosis. Employer's Exhibit 1.

Rasmussen's opinion to be better reasoned.[4] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, we reject employer's assertions that the administrative law judge erred in failing to explain why she found Dr. Rasmussen's opinion to be more persuasive than the contrary opinions of Drs. Loudon, Renn, Stewart and Zaldivar, and that the administrative law judge erred by

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[4] Employer, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), asserts that the administrative law judge's finding that the opinion of Dr. Rasmussen is well reasoned violates the Administrative Procedure Act (APA) since she failed to provide any basis for her conclusion. In *Hicks*, the administrative law judge cited no valid reasons for crediting Dr. Rasmussen's opinion over Dr. Zaldivar's opinion. In addition, the administrative law judge did not provide adequate reasons for discrediting Dr. Zaldivar's opinion. Hence, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Hicks* that the administrative law judge failed to adequately explain why he credited certain evidence and discredited other evidence. However, in the case at hand, the administrative law judge stated that "Dr. Rasmussen...has had the benefit of examining the Claimant on more than one occasion, and he has each time thoroughly discussed the clinical evidence pertinent to the Claimant's individual claim." 1998 Decision and Order on Remand at 5. In contrast, the administrative law judge stated that Drs. Loudon, Renn, Stewart and Zaldivar "have not adequately explained how the documentation contained within their reports supports their conclusions." *Id.* at 7. The administrative law judge observed that Dr. Zaldivar's "discussion of whether the claimant had pneumoconiosis (either coal workers' pneumoconiosis or chronic bronchitis resulting from coal mine dust exposure) was perfunctory by comparison." *Id.* at 6. Thus, we reject employer's assertion that the administrative law judge's finding that the opinion of Dr. Rasmussen is well reasoned violates the APA since she failed to provide any basis for her conclusion.

selectively analyzing the medical evidence.[5]

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[5] Employer, citing *Hicks*, also asserts that the administrative law judge erred in failing to provide an explanation for according greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar, in view of Dr. Zaldivar's superior qualifications. In *Hicks*, the administrative law judge ignored the respective qualifications of the physicians. Whereas, in that case, Dr. Rasmussen was Board-certified in only Internal Medicine, Dr. Zaldivar was Board-certified in both Internal Medicine and Pulmonary Disease. Although the administrative law judge noted the relative qualifications of Drs. Rasmussen and Zaldivar, he attributed no importance to the comparative credentials of the physicians. The administrative law judge also completely ignored the medical opinions of the other physicians, despite their credentials. Hence, the United States Court of Appeals for the Fourth Circuit held that the administrative law judge improperly discounted the respective qualifications of the physicians. In the instant case, the administrative law judge properly considered the respective qualifications of the physicians. The administrative law judge observed that Dr. Rasmussen's curriculum vitae "reflects that Dr. Rasmussen has been [B]oard certified in Internal Medicine since 1961 and has impressive credentials." 1998 Decision and Order on Remand at 5. The administrative law judge also observed that "[w]hile Dr. Rasmussen may lack a [B]oard certification in the subspecialty of pulmonary diseases, he has extensive experience in pulmonary medicine and the pulmonary diseases of coal miners (including 'black lung') and I find him to be as qualified as any of the other physicians rendering opinions, including Drs. Zaldivar, Stewart, and Renn, who are [B]oard certified in the subspecialty of pulmonary medicine." *Id.* Therefore, we reject employer's assertion that the administrative law judge erred in failing to provide an explanation for according greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar, in view of Dr. Zaldivar's superior qualifications. Moreover, we reject employer's assertion that the administrative law judge erred by failing to explain the reversal in her prior finding that Dr. Rasmussen's credentials are not impressive to her current finding that Dr. Rasmussen's credentials are impressive, inasmuch as the Board remanded the case to the administrative law judge to reconsider the evidence at 20 C.F.R. §718.202(a)(4).

Next, employer asserts that the administrative law judge erred by discrediting the opinions of Drs. Loudon, Renn, Stewart and Zaldivar because their opinions are in conflict with the holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). The administrative law judge stated that Drs. Loudon, Renn, Stewart and Zaldivar "appear to believe that an obstructive impairment due to chronic bronchitis/COPD could never be caused by coal mine dust exposure." 1998 Decision and Order on Remand at 6. In *Warth*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an assumption that an obstructive disorder, rather than a restrictive disorder, cannot be caused by coal mine employment, is erroneous. Subsequently, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that an administrative law judge is not precluded from relying on a physician's opinion which is not based upon the erroneous assumption that coal mine employment can never cause a chronic obstructive pulmonary disease. In the instant case, Dr. Loudon opined that "neither chronic obstructive pulmonary disease nor asthma is caused by coal workers' pneumoconiosis or coal dust exposure." Employer's Exhibit 5. Thus, we reject employer's assertion that the administrative law judge erred by discrediting the opinion of Dr. Loudon because Dr. Loudon's opinion is in conflict with the holding in *Warth*. However, Drs. Renn, Stewart and Zaldivar did not assume that coal mine employment can never cause chronic obstructive pulmonary disease. Rather, the doctors provided explanations for concluding that claimant's pulmonary impairment is due to his

cigarette smoking and not coal dust exposure. Nonetheless, since the administrative law judge provided a valid alternate basis for according greater weight to the opinion of Dr. Rasmussen than to the contrary opinions of Drs. Renn, Stewart and Zaldivar, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that she accorded greater weight to Dr. Rasmussen's opinion because she found it to be better reasoned, *see Clark, supra; Fields, supra; Fuller, supra*, we hold that the administrative law judge's error in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).[6]

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[6] Employer asserts that the administrative law judge erred by discrediting Dr. Zaldivar's opinion based on the inaccurate conclusion that Dr. Zaldivar did not diagnose chronic obstructive pulmonary disease/chronic bronchitis. The administrative law judge discounted Dr. Zaldivar's opinion because "Dr. Zaldivar's failure to include chronic bronchitis as a component of COPD is inconsistent with the opinions of the other physicians." Decision and Order on Remand at 8 n.6. The administrative law judge observed that "COPD [chronic obstructive pulmonary disease] includes bronchitis, as Drs. Loudon and Stewart indicated." *Id.* However, an examination of the record indicates that whereas Drs. Loudon, Rasmussen and Renn diagnosed chronic bronchitis, Dr. Stewart did not diagnose chronic bronchitis. Nonetheless, since the administrative law judge provided a valid alternate basis for according greater weight to the opinion of Dr. Rasmussen than to the contrary opinion of Dr. Zaldivar, *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983), in that she accorded greater weight to Dr. Rasmussen's opinion because she found it to be better reasoned, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), we hold that any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We also reject employer's assertion that the administrative law judge erred by including all chronic pulmonary diseases within the regulatory definition of pneumoconiosis since claimant must show a significant relationship between the respiratory impairment and coal dust exposure to satisfy the regulatory definition of pneumoconiosis. Contrary to employer's assertion, the administrative law judge did not include all chronic pulmonary diseases within the regulatory definition of pneumoconiosis. Rather, the administrative law judge stated that "any chronic pulmonary disease will qualify as pneumoconiosis **if** it is either related to or aggravated by coal mine dust exposure." 1998 Decision and Order on Remand at 4 (emphasis added). Further, the administrative law judge observed that 20 C.F.R. §718.201 provides that "[f]or purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment **significantly related to, or substantially aggravated by**, dust exposure in coal mine employment." *Id.* (emphasis added). Moreover, we reject employer's assertion that a physician must find an *impairment* caused by coal dust exposure in order to satisfy the statutory meaning of coal workers' pneumoconiosis. Although chronic pulmonary *impairments* are included in the regulatory definition of pneumoconiosis, the regulations did not limit the definition of pneumoconiosis to pulmonary *impairments* caused by coal dust exposure. To the contrary, the regulations include all *diseases* arising out of coal dust exposure. 20 C.F.R. §718.201.

In addition, employer, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), asserts that the administrative law judge erred by summarily incorporating the prior flawed findings of fact into the decision on remand rather than independently re-analyzing all of the relevant evidence of record. In *Hicks*, the administrative law judge reviewed the miner's claim on three separate occasions since the Board remanded the claim twice for reconsideration. In his third order, the administrative law judge incorporated all non-inconsistent findings of fact from his previous two orders and awarded benefits based solely upon Dr. Rasmussen's opinion. Instead of specifying the bases for his determination to award benefits in his third order, the administrative law judge merely incorporated the findings of fact from his two previous orders. The United States Court of Appeals for the Fourth Circuit in that case held that the administrative law judge's final order, incorporating all previous findings, violated the APA because the administrative law judge relied upon summary conclusions that were not fully explained or supported. The court stated that it is difficult for a reviewing body to ascertain exactly what evidence and conclusions the administrative law judge relied upon to determine total disability and causation. The court also observed that many of the administrative law judge's previous findings, such as his reasons for discrediting Dr. Zaldivar's opinion, had been expressly vacated by the Board. Further, the court observed that some of the administrative law judge's conclusions of law were also reversed by later court rulings, such as the United States Supreme Court's holding that the 'true doubt' rule is invalid.

The facts in the instant case are distinguishable from the facts in *Hicks*. Here, the administrative law judge stated that "[t]he facts, pertinent evidence, and procedural background are set forth in detail in [her 1996] decision, which is incorporated by reference herein, and I adopt my prior decision except to the extent modified herein." 1998 Decision and Order on Remand at 1. Further, as instructed by the Board, the administrative law judge independently considered the relevant medical evidence of record on the merits at 20 C.F.R. §§718.202(a)(4) and 718.204(b). Thus, we reject employer's assertion that the administrative law judge erred by summarily incorporating the prior flawed findings of fact into the decision on remand rather than independently re-analyzing all of the relevant evidence of record.

Finally, employer contends that the administrative law judge erred in finding the onset date of disability to be August 1993, the date the claim was filed. We disagree. The administrative law judge stated, "As explained in my [prior] decision,[7] benefits shall be payable from August 1993, the date the claim was filed." *Id.* at 9. In her previous decision, the administrative law judge stated that "[a]lthough the Claimant stopped working in 1985, the evidence is not entirely clear as to the date of onset of the disability due to pneumoconiosis." 1996 Decision and Order on Remand at 16. Hence, the administrative law judge stated that "benefits should be payable from the month during which the claim was filed, or August 1993." *Id.* The pertinent regulations provide that "[w]here the

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[7] Although the administrative law judge referred to her September 1997 decision, the administrative law judge's prior decision was dated August 22, 1996.

evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b).

Employer asserts that the provision of 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the APA, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The regulations generally provide that "[e]xcept as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq.*" 20 C.F.R. §725.452(a). Further, the APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). As the Director asserts, since 20 C.F.R. §725.503(b) specifically provides that the onset date of disability is to be determined by the date that the claim is filed when the record does not contain evidence which can establish the onset date of disability, 20 C.F.R. §725.503(b), we hold that the APA is inapplicable to 20 C.F.R. §725.503(b), 5 U.S.C. §556(d). Therefore, we reject employer's assertion that the provision of 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a

disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the APA.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

/s/ Betty Jean Hall
BETTY JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith
ROY P. SMITH
Administrative Appeals Judge

/s/ Malcolm D. Nelson
MALCOLM D. NELSON, Acting
Administrative Appeals Judge

U.S. Department of Labor
Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

In the Matter of:	:	
	:	
JAMES R. RAMSEY,	:	
Claimant,	:	
	:	Case No. 94-BLA-1898
v.	:	OWCP No. 236-38-2524
	:	
WESTMORELAND COAL COMPANY,	:	
Employer,	:	
	:	
and	:	
	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	

DATE ISSUED: January 27, 1998
[Entered: January 27, 1998]

DECISION AND ORDER ON SECOND REMAND GRANTING BENEFITS

By a 16-page Decision and Order on Remand Granting Benefits, dated August 22, 1996, I awarded the Claimant benefits in the above-captioned matter. My decision was made in accordance with a prior

decision of the Benefits Review Board dated October 26, 1995, which had affirmed in part and vacated in part Judge Johnson's decision of February 15, 1995. The facts, pertinent evidence, and procedural background are set forth in detail in that decision, which is incorporated by reference herein, and I adopt my prior decision except to the extent modified herein.

By an unpublished Decision and Order, dated September 26, 1997 [hereafter "Board's Decision"],[1] the Benefits Review Board affirmed in part and vacated in part my August 1996 decision and remanded for proceedings consistent with its opinion. The Board determined that my "weighing of the medical evidence is flawed and cannot be affirmed."

First, the Board vacated my finding that the claimant had established a material change in conditions pursuant to 20 C.F.R. § 725.309 and the existence of pneumoconiosis under 20 C.F.R. § 718.202(a)(4) for the following reasons:

1. My finding "that Dr. Zaldivar's opinion that claimant did not suffer from pneumoconiosis was conclusory, is not supported by substantial evidence."

2. I "erred in discrediting Dr. Zaldivar's opinion on the basis that Dr. Zaldivar failed to explain why claimant's pulmonary condition would not be more reversible if it were attributable to asthma alone."

3. I "erred in according weight to the opinion of Dr. Rasmussen as 'objective' because Dr. Rasmussen examined claimant on behalf of the Department of Labor."

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[1] Although the Board's Decision is dated in September 1997, the record was not returned to the Office of Administrative Law Judges until December 1997 and the case was not docketed until January 1998.

4. I "shifted the burden of proof to the employer in concluding that [the Employer's] physicians were under an affirmative duty to explain why coal mine dust has played no part in the development of claimant's lung disease."

5. My "rejection of the opinions of Drs. Zaldivar, Loudon, Renn and Stewart, who found the claimant did not have coal worker's pneumoconiosis constituted, on the facts of this case, an improper substitution of [my] opinion for those of the physicians." On remand, I was directed in a footnote [footnote 5] to "consider whether the opinions of Drs. Zaldivar, Loudon, Renn, and Stewart are reasoned medical opinions, i.e., whether the doctors have explained how the documentation contained within their reports supports their conclusions." (Board's decision at 4 to 5).

Second, the Board vacated my finding that the Claimant met his burden of proving he is totally disabled due to pneumoconiosis in accordance with 20 C.F.R. § 718.204(b) because I "erred in finding that the opinions of Drs. Loudon, Renn, Stewart, and Abraham supported claimant's burden." The Board found that I "acted irrationally and impermissibly analyzed the medical evidence to find that this evidence supported claimant's burden at Section 718.204(b)." (Board's Decision at 5 to 6). Specifically, the Board noted:

. . . . The administrative law judge stated that although Dr. Loudon attributed claimant's bronchitis to smoking, Dr. Loudon's rationale could be applied "to the extent that coal dust exposure caused the bronchitis." . . . . Inasmuch as Dr. Loudon specifically found that coal dust exposure did not contribute to claimant's lung disease, the administrative law judge erred in substituting her findings for those of the physician and erred in finding that Dr. Loudon's opinion supported claimant's burden under Section 718.204(b). . . . Similarly, Dr. Stewart specifically found that claimant's disability was not caused by coal worker's pneumoconiosis, and that claimant's impairment was due to chronic obstructive pulmonary disease or asthma not related to coal dust exposure. . . . Dr. Renn specifically found that claimant did not have pneumoconiosis and had chronic bronchitis from tobacco smoking[2]. . . . In addition, the report of Dr. Abraham is insufficient, as a matter of law, to allow the administrative law judge to infer that it supports a finding that pneumoconiosis contributed to claimant's disability under Section 718.204(b). . . . [Citations omitted.]

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2 The Board's comments (particularly with respect to Dr. Renn) do not appear to take into account that chronic bronchitis may qualify as pneumoconiosis under the regulations, as the Board recognized in its previous unpublished decision of October 26, 1995. The physicians rendering opinions in this case disagree as to whether chronic bronchitis or COPD can be caused or aggravated by coal mine dust exposure, as discussed infra.

In a footnote [footnote 6], the Board noted that in a two sentence letter, Dr. Abraham diagnosed chronic obstructive pulmonary disease, hypertension, and pneumoconiosis, and in a discharge summary, he diagnosed angina, hypertension, and chronic obstructive pulmonary disease. (Board's Decision at 5).

In reviewing these comments, it appears that I inartfully drafted the decision. Aside from the comments relating to my giving more weight to an opinion because it was made by a physician retained by the Department of Labor[3] and relying upon a conclusory opinion by Dr. Abraham, it appears that I have not adequately explained how I weighed the evidence, because the Board's remaining comments essentially reflect that the Board would have weighed the medical opinion evidence differently. But cf. Jewell Smokeless Coal Corp. v. Street, 42 F.3d 241, 245 (4th. Cir. 1994) (Benefits Review Board cannot reweigh evidence and make factual findings as such functions are those of the administrative law judge as fact finder.) I will try to further explain the basis for my weighing of the evidence herein and will discuss each of the Board's findings of error.

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[3] The Board is quite correct that it has prohibited this practice before. See, e.g., Melnick v. Consolidation Coal Co., 16 B.L.R. 1-31, 1-35-36 (1991) [cited in the Board's decision]. Although I am unable to agree that in adopting such a prohibition on the manner in which evidence may be weighed the Board has not invaded the province of the administrative law judge (see Jewell Smokeless Coal Corp. v. Street, 42 F.3d 241, 245 (4th. Cir. 1994)), I agree that I should not have done so in this case, but the outcome of this case would not change on that basis, as discussed infra.

Material Change in Conditions and Existence of Pneumoconiosis

The Board discussed the issues of material change in conditions and existence of pneumoconiosis together because in my previous decision, I found a material change in conditions based upon the newly submitted evidence, which I found to establish the existence of pneumoconiosis. Accordingly, I will also discuss these issues together.

In my prior decision, I was required to address the duplicate claim issue as a preliminary matter. In this regard, the decision issued by Judge Clarke on April 24, 1987, found that the Claimant failed to prove that he had pneumoconiosis arising out of coal mine employment or that his total disability was due to pneumoconiosis and the Benefits Review Board affirmed the decision based upon a finding of no pneumoconiosis on May 27, 1992. (DX 26). The claim now before me was filed on August 31, 1993 (DX 1). Accordingly, under 20 C.F.R. § 725.309(d), the current claim must be denied as a duplicate claim unless the evidence establishes a material change in conditions. Under Lisa Lee Mines v. Director, OWCP [Rutter], 20 B.L.R. 2-227, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc), if the Claimant can establish, under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him, he can establish a material change in conditions.

As I noted in my prior decision, and as the Board noted in its October 26, 1995 decision, pneumoconiosis as defined by the regulations encompasses more than the disease known as "coal workers' pneumoconiosis." Under the regulatory definition:

> . . .[P]neumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. § 718.201. Thus, any chronic pulmonary disease will qualify as pneumoconiosis if it is either related to or aggravated by coal mine dust exposure. See also Warth v. Southern Ohio Coal Company, 60 F.3d 173 (4th Cir. 1995) (chronic obstructive pulmonary disease (COPD) may fall within the statutory definition of pneumoconiosis).

In my prior decision, after considering all the new medical opinion evidence together in the context of the above principles, I found that the Claimant had

asthma and chronic bronchitis (resulting in COPD), and that the chronic bronchitis was caused by both cigarette smoking and coal mine dust exposure. I also found that the Claimant had simple coal worker's pneumoconiosis, but it did not appear to be of any clinical significance. I thus found that the Claimant had established that he had pneumoconiosis within the meaning of the regulations based upon the newly submitted evidence, and he had therefore established a material change in conditions under the pertinent regulations. I next considered the merits of the claim under all of the evidence of record. In this regard, Judge Johnson's findings concerning the existence of pneumoconiosis were affirmed except for his findings with respect to medical opinion evidence under 20 C.F.R § 718.202(a)(4), which were vacated for a determination "whether the miner suffered from clinical pneumoconiosis or presumed pneumoconiosis" and specifically "whether coal dust exposure during the miner's coal mine employment was a contributing cause of his respiratory condition." After consideration of all the evidence of record, I found that the Claimant established the existence of pneumoconiosis (consisting of chronic bronchitis/COPD resulting in part from coal mine dust exposure and a minimal amount of coal workers' pneumoconiosis) under the pertinent regulation and that coal mine dust exposure was a contributing cause to his respiratory condition. In so finding, I relied most upon the more recent evidence as being most probative concerning the Claimant's current diagnoses and condition.

In reaching these conclusions, I essentially found Dr. Rasmussen's reasoning to be more persuasive than that of Drs. Zaldivar, Loudon, Renn,

and Stewart. It is in my discussion of the basis for my crediting of Dr. Rasmussen's finding of pneumoconiosis over the findings to the contrary of the other physicians, and of my acceptance of some of the determinations of the other physicians, that the Board found I committed error and substituted my own medical judgment.[4] To the contrary, I simply found Dr. Rasmussen's opinion, in his most recent report (and then considered along with the other evidence, including his prior reports (DX 26)), to be better reasoned and better supported. Further, Dr. Rasmussen (like Dr. Zaldivar) has had the benefit of examining the Claimant on more than one occasion, and he has each time thoroughly discussed the clinical evidence pertinent to the Claimant's individual claim. Drs. Loudon, Renn, and Stewart did not examine the Claimant. Moreover, in his November 17, 1989 report, Dr. Rasmussen discussed literature concerning

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[4] Although the Employer argued before the Board that Dr. Rasmussen's credentials are not of record (see **Westmoreland** Coal Company's Petition for Review and Supporting Brief filed October 15, 1996 at page 9), that is simply not true. A curriculum vitae for Dr. Rasmussen appears in Director's Exhibit 26 (the prior claim), and is identified therein as Claimant's Exhibit No. 9. It reflects that Dr. Rasmussen has been board certified in Internal Medicine since 1961 and has impressive credentials. While Dr. Rasmussen may lack a board certification in the subspecialty of pulmonary diseases, he has extensive experience in pulmonary medicine and the pulmonary diseases of coal miners (including "black lung") and I find him to be as qualified as any of the other physicians rendering opinions, including Drs. Zaldivar, Stewart, and Renn, who are board certified in the subspecialty of pulmonary medicine. Although the Employer argued that it was error to consider Dr. Rasmussen an "expert" (id. at 7 to 9), Employer's own expert, Dr. Zaldivar, stated at the hearing before Judge Clarke that he recognized Dr. Rasmussen as an expert in pulmonary diseases. (DX 26, Transcript of October 3, 1989 Hearing at page 44).

epidemiological studies supporting his opinion that obstructive lung disease can be caused by coal mine dust exposure (DX 26, identified as Claimant's Exhibit 16 therein), and I find his well-reasoned, well-supported reports to be highly probative and entitled to significant weight.

In its first and second points, the Board held that my finding that Dr. Zaldivar's opinion that the claimant did not suffer from pneumoconiosis is conclusory was not supported by substantial evidence and also held that I erred in discrediting Dr. Zaldivar's opinion on the basis that he failed to explain why the claimant's pulmonary condition would not be more reversible if it were attributable to asthma alone. I plead guilty to inartful drafting on this issue. The point that I was trying to make is that I gave less weight to Dr. Zaldivar's opinion on this issue than I gave to Dr. Rasmussen's opinion because Dr. Zaldivar did not adequately explain the basis for his conclusions, notwithstanding the preparation of several reports and attendance at a deposition and at the prior hearing. After reading the entire deposition, his prior testimony, and all the reports, my impression was that Dr. Zaldivar had given a very persuasive and detailed discussion concerning the existence of asthma, supported by reference to clinical findings, but his discussion of whether the claimant had pneumoconiosis (either coal workers' pneumoconiosis or chronic bronchitis resulting from coal mine dust exposure) was perfunctory by comparison. I mentioned his failure to explain why the Claimant's pulmonary condition would not be more reversible if it were attributable to asthma alone because he discussed the reversibility of the condition extensively, yet the

clinical data only revealed partial reversibility.[5] In rejecting Dr. Zaldivar's opinion on that issue, I relied in part upon Dr. Loudon's discussion. Dr. Zaldivar's opinion is inconsistent with that of Dr. Loudon on that issue and Dr. Loudon persuasively explained why the reversibility findings support a diagnosis of chronic bronchitis. Thus, I decided to credit Dr. Loudon and Dr. Rasmussen over Dr. Zaldivar on this issue. Nevertheless, even ignoring the reversibility issue, my main basis for rejecting Dr. Zaldivar's opinion is that he did not find COPD/chronic bronchitis, a finding which all of the other physicians made, and I found the weight of the medical evidence to be against Dr. Zaldivar on that issue. I still so find.

Similarly, turning to the fourth point, the Board found that I had impermissibly shifted the burden of proof to the employer in concluding that the physicians retained by the employer were under an affirmative duty to explain why coal mine dust played no part in the development of claimant's lung disease. To the contrary, I never shifted the burden of proof to the Employer. What I did was indicate that the opinions lacked an analysis of that issue, and after considering them overall, they simply did not persuade me, the fact finder. These physicians appear to believe that an obstructive impairment due to chronic bronchitis/ COPD could never be caused by coal mine dust

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[5] With respect to the testimony that Dr. Zaldivar gave before Judge Clarke on October 3, 1989, the Board (at page 4, footnote 3 of its decision) has quoted his testimony to the effect that coal workers' pneumoconiosis can cause an obstructive defect that is not reversible in addition to his testimony that "coal worker's pneumoconiosis produces emphysema or a reversible obstruction" (Transcript of October 3, 1989 hearing at page 35, 37-38).

exposure. On the other hand, I found Dr. Rasmussen's opinion to be persuasive in his discussion of the claimant's case specifically, as well as in his discussion of the epidemiological evidence. One persuasive opinion can outweigh several ones that are not as persuasive, and it did so in this case.

Along similar lines, as its fifth point, the Board stated that my rejection of the opinions of Drs. Zaldivar, Loudon, Renn, and Stewart constituted an improper substitution of my opinion for theirs. Again, I do not agree that the acceptance of the opinion of one physician over four others, because that one opinion is more persuasive and more supported by the clinical and other evidence of record, would constitute an improper substitution of my opinion. If a decision were to be based solely on the number of physicians holding a particular view point, there would be no need for judges to handle these cases. The whole process could be computerized. I continue to find that the opinions of these physicians have been outweighed by that of Dr. Rasmussen. I am reluctant to find that the opinions of these physicians are not "reasoned," but under the definition provided in footnote 5 by the Board (citing Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989) (en banc)), they are not, as they have not adequately explained how the documentation contained within their reports supports their conclusions.

Finally, as its third point, the Board stated that I erred in according weight to the opinion of Dr. Rasmussen as objective because Dr. Rasmussen examined the Claimant on behalf of the Department of Labor. Since I wrote the opinion, I have learned of the Board's position that no such inference can be drawn. Moreover, in reviewing the record again I noted that

the Claimant had requested that Dr. Rasmussen perform the examination. (DX 1). Nonetheless, the main reason I gave more weight to Dr. Rasmussen's opinion is that I simply found it to be well reasoned, thorough, and supported by clinical and other data, and I continue to find his reasoning to be more persuasive than that of the other physicians, after taking away any inference concerning his objectivity.

Accordingly, after considering the medical evidence discussed above, taking into consideration the findings of error made by the Board, I still find that the Claimant has chronic bronchitis which is due in part to coal mine dust exposure as well as simple coal workers' pneumoconiosis and that he therefore has pneumoconiosis as defined by the regulations, based upon a review of the newly submitted evidence and based upon a review of all of the evidence of record. Accordingly, I find that the Claimant has established a material change in conditions and that he has established the existence of pneumoconiosis.

Causation of Total Disability

As I noted in my previous decision, the Fourth Circuit has held that a Claimant's pneumoconiosis must be at least a "contributing cause" of his totally disabling pulmonary impairment. Hobbs v. Clinchfield Coal Co., 917 F.2d 790 (4th Cir. 1990); Robinson v. Pickands Mather & Co., 914 F.2d 35 (4th Cir. 1990). In Robinson, the Fourth Circuit explained that the pneumoconiosis must be a necessary condition of his disability, and if he would have been disabled to the same degree and by the same time in his life if he had never been a miner, then benefits should not be awarded.

In my prior decision, based on Dr. Rasmussen's report read in the context of the other evidence of record, I found the Claimant to be suffering from asthma, chronic bronchitis/COPD (resulting from cigarette smoking and coal mine dust exposure), and coal worker's pneumoconiosis. I also found that while there was not sufficient evidence to establish that the Claimant has clinically significant CWP to the extent that it is a necessary condition of his total disability, as required by Robinson, the Claimant's chronic bronchitis/COPD[6] (which I found to constitute pneumoconiosis within the meaning of the applicable regulations, as discussed above) was a contributing cause to his total disability. In reaching this conclusion, I relied upon the opinions of Drs. Rasmussen, Loudon, Renn, Stewart, and Abraham, and I indicated that all of them found the Claimant to have bronchitis and/or COPD which contributed to his total disability, although only Dr. Rasmussen found the bronchitis/COPD to be attributable to coal mine dust exposure.

The Board is quite correct that my reliance upon Dr. Abraham for this proposition was misplaced. Although Dr. Abraham found the Claimant to have COPD [chronic obstructive pulmonary disease] and pneumoconiosis [coal workers' pneumoconiosis] in his most recent report, he did not address the issue of total disability in that opinion. What I had intended to state was that I relied

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[6] COPD [chronic obstructive pulmonary disease] includes bronchitis, as Drs. Loudon and Stewart indicated. Dr. Zaldivar's failure to include chronic bronchitis as a component of COPD is inconsistent with the opinions of the other physicians and I reject it.

upon Dr. Abraham's decision solely to the extent that Dr. Abraham, one of the Claimant's treating physicians, corroborated the diagnoses of COPD and pneumoconiosis. Indeed, the weight of the evidence establishes that the Claimant has COPD/chronic bronchitis.[7]

On the other hand, Drs. Loudon, Renn, and Stewart all found the Claimant to have chronic bronchitis/COPD, although they did not find it to be caused in whole or in part by coal mine dust exposure. They also found that the chronic bronchitis/COPD was a contributing factor to his total disability. Thus, I found these opinions to be corroborative of that of Dr. Rasmussen on the issue of the etiology of the Claimant's disability. They went so far as to find that the chronic bronchitis/COPD played a major role in the development of the Claimant's disability, although they did not find the chronic bronchitis/COPD to be caused by coal mine dust. In finding the Claimant's chronic bronchitis/COPD to constitute pneumoconiosis under the regulations ("legal pneumoconiosis") (in addition to coal workers' pneumoconiosis), I rejected the opinions of these physicians and adopted that of Dr. Rasmussen on that issue, for the reasons detailed above. While I am puzzled that the Board does not find these opinions supportive of my determination that the Claimant's pneumoconiosis (which I found to include his COPD/chronic bronchitis) caused his total

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[7] For the reasons discussed above, I found that the chronic bronchitis/COPD was attributable in part to coal mine dust exposure. Thus, it may be deemed pneumoconiosis.

disability,[8] it does not make any difference in the ultimate outcome whether the opinions are so deemed. The bottom line is that I found Dr. Rasmussen's opinion to be better reasoned, better supported by clinical and epidemiological evidence, and more persuasive, and I found it to outweigh the other opinions of record. I continue to so find.

In view of the above, after reviewing this case once again under the mandates set forth by the Benefits Review Board, I again find that the Claimant has met his burden of proving that he is totally disabled due to pneumoconiosis, and he has therefore established entitlement to benefits under the Act. As explained in my September 1997 decision, benefits shall be payable from August 1993, the date the claim was filed.

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[8] At the risk of belaboring this point, my reasoning was as follows: (1) Based upon the opinions of Drs. Loudon, Renn, Stewart, Rasmussen, and Abraham, which I found to be more persuasive than that of Dr. Zaldivar on the issue, the Claimant established that he has COPD/chronic bronchitis; (2) Based upon Dr. Rasmussen's opinion, which I found to be more persuasive than the other opinions, the Claimant established that he has "legal pneumoconiosis", because his COPD/chronic bronchitis was caused by coal mine dust exposure; and (3) Based upon the opinions of Drs. Loudon, Renn, Stewart, and Rasmussen, which I found to be more persuasive than that of Dr. Zaldivar, the Claimant established that his COPD/chronic bronchitis was a significant contributing factor to his total disability. Using simple logic and common sense, the Claimant has therefore established that he has pneumoconiosis arising out of coal mine employment.

ORDER

IT IS HEREBY ORDERED that the claim of James R. **Ramsey** for benefits under the Act be, and hereby is, GRANTED.

/s/ Pamela Lakes Wood
PAMELA LAKES WOOD
Administrative Law Judge
Washington, D.C.

NOTICE OF APPEAL RIGHTS: Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. 20 C.F.R. § 725.481. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Bldg., Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Filed January 8, 2002
[Entered: January 8, 2002]

No. 99-2049;
98-682-BLA

WESTMORELAND COAL COMPANY,
INCORPORATED,
Petitioner,

v.

JAMES R. RAMSEY and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for Rehearing and Rehearing En Banc

The petitioner's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court
/s/ Patricia S. Connor
CLERK

20 C.F.R. § 718.201:

For the purpose of the Act, *pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R § 718.202(a)(*full text*):

Determining the existence of pneumoconiosis. (a) A finding of the existence of pneumoconiosis may be made as follows:

(1) A chest X-ray conducted and classified in accordance with §718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

(i) In all claims filed before January 1, 1982, where there is other evidence of pulmonary or respiratory impairment, a Board-certified or Board-eligible radiologist's interpretation of a chest X-ray shall be accepted by the Office if the X-ray is in compliance with the requirements of §718.102 and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudulently represented. However, these limitations shall not apply to any claim filed on or after January 1, 1982.

(ii) The following definitions shall apply when making a finding in accordance with this paragraph.

(A) The term other evidence means medical tests such as blood-gas studies, pulmonary function studies or physical examinations or medical histories which establish the presence of a chronic pulmonary, respiratory or cardio-pulmonary condition, and in the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physical condition.

(B) Pulmonary or respiratory impairment means inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and diffusion.

(C) Board-certified means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(D) Board-eligible means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(E) Certified `B' reader or `B' reader means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in

the use of the ILO-U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. See 42 CFR 37.51(b)(2).

(F) Qualified radiologic technologist or technician means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a state licensing board.

(2) A biopsy or autopsy conducted and reported in compliance with §718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

(3) If the presumptions described in §§718.304, 718.305 or §718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis.

(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

20 C.F.R. § 718.304 (*full text*):

Irrebuttable presumption of total disability or death due to pneumoconiosis. There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest X-ray (see §718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:

(1) The ILO-U/C International Classification of Radiographs of the Pneumoconiosis, 1971, or subsequent revisions thereto; or

(2) The International Classification of the Radiographs of the Pneumoconiosis of the International Labour Office, Extended Classification (1968) (which may be referred to as the "ILO Classification (1968)"); or

(3) The Classification of the Pneumoconiosis of the Union Internationale Contra Cancer/Cincinnati (1968) (which may be referred to as the "UICC/Cincinnati (1968) Classification"); or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: Provided, however, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. § 725.503(b):

(b) In the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed, or the month during which the Claimant elected review under part 727 of this subchapter.